Supreme Court, U.S.
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No. 95-266

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr., Deceased,

Petitioner,

v.

MARYLU REDMOND, Hoffman Estates Police Officer,
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Do the Federal Rules of Civil Procedure provide a district judge with adequate tools to protect the privacy interests involved in confidential communications with a psychotherapist without the creation of a new evidentiary privilege under Rule 501 of the Federal Rules of Evidence?

2. Assuming that a privilege for psychotherapist-patient communications is required to protect confidential communications, should the privilege be extended to social workers, rather than being limited to psychiatrists and clinical psychologists, as contemplated in Proposed Rule of Evidence 504?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Court of Appeals (Pet.App. 1-24) is reported at 51 F.3d 1346. The rulings of the district court (Pet.App. 27-34, 35-40, 41-50, 51-59, 60-64, 65-66) are unreported.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court was invoked under 28 U.S.C. §1254 in a petition filed on August 10, 1995. The Court granted the petition on October 16, 1995.

RULES INVOLVED

This case involves Rule 501 of the Federal Rules of Evidence:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state or political subdivision thereof shall be determined in accordance with state law.

STATEMENT

In 1991, petitioner filed a lawsuit under 42 U.S.C. §1983 seeking damages for the death of her son, Ricky Allen, who had been killed by respondent MaryLu Redmond, a police officer employed by respondent Hoffman Estates, Illinois.[1] (App. 8-12.)

Respondent Redmond shot Allen while responding to a "fight in progress" call at an apartment complex. (App. 123.)

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1. Petitioner also asserted a wrongful death claim under Illinois law. (App. 9-11.) The minor children of Ricky Allen joined in the complaint to assert a Section 1983 claim for the loss of their father. (App. 11.) Plaintiffs voluntarily dismissed the children's claim before the case was submitted to the jury.

Redmond, who was the first officer to arrive at the incident, was met at her police car by Connie Allen and Sharon Allen, who told Redmond that there had been a stabbing inside one of the apartments. (App. 126.) According to Redmond, as she approached the entrance to the apartment building, she saw five men "exit the building in a hurry." (App. 128.) One of the men was waving a pipe over his head. (*Id.*) Redmond testified that she ordered the man to drop the pipe and instructed everyone to get on the ground, but none of the men heeded her commands. (*Id.*) Redmond testified that she then drew her service revolver (*id.*), and observed two men, one black, one white, running out of the building. (App. 129.) Redmond stated that the black man, Ricky Allen, was holding a butcher knife and chasing the white man, Thomas Jamell. (*Id.*) According to Redmond, she shot Allen as he was about to strike Jamell with a knife, after Allen had disregarded "at least three" verbal orders to drop the knife.[2] (App. 159.) A knife was recovered near Allen's body. (Testimony of Officer Graham, Tr. 440.)

Petitioner presented evidence at trial that Allen was unarmed,[3] that Redmond had emerged from her car with her gun drawn,[4] and that Redmond had panicked when she saw Allen walk out of the apartment building and shot him without any warning.[5] Petitioner secured an admission from

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2. Jamell did not testify at trial, even though respondents' counsel had alluded to Jamell's expected testimony in his opening statement. (Tr. 21.)

3. This testimony came from the siblings of Ricky Allen. (Connie Allen, Tr. 60; Robin Allen, Tr. 116, 118.)

4. Sharon Allen, Tr. 255.

5. Connie Allen, Tr. 54; Robin Allen, Tr. 118; Donald Jaffee, Tr. 179.

the second officer on the scene that Redmond was "somewhat bewildered as far as what had just transpired." (Officer Graham, Tr. 445.) Petitioner also presented evidence that a police officer had planted the knife after the shooting.[6]

A paramedic who came on the scene shortly after the shooting, and who removed Allen's body from the scene, testified that he had not seen a knife. (Tr. 590.) The first police officer to arrive at the scene after the shooting stated on cross-examination that the knife was on Allen's left side (Officer Graham, Tr. 456); respondent Redmond testified that the knife was on Allen's right side. (App. 163.)

The jury returned a verdict in favor of petitioner, awarding forty five thousand dollars on the federal civil rights claim and five hundred thousand dollars on the state wrongful death claim. (Order, December 22, 1993.)

A. The Privilege Rulings

In the course of pre-trial discovery, respondent Redmond disclosed that immediately after the incident, she had discussed the shooting with Karen Beyer, a social worker employed by respondent Hoffman Estates, with whom Redmond was meeting several times a week for ninety minute sessions.[7] (App. 29.) When petitioner sought discovery from

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6. This testimony came from siblings of Ricky Allen. (Robin Allen, Tr. 120; Donald Jaffee, Tr. 186; Sharon Allen, Tr. 267-68.) In addition, one of the first police personnel on the scene, a trainee, testified that he heard voices in the crowd yelling "They're moving the knife." (Tr. 234.)

7. Beyer is a licensed clinical social worker and holds a Masters Degree in social work. (App. 18.) At the time of the incident, Ms. Beyer was the Director of Health and Human Services for respondent Hoffman Estates. (*Id.*)

the social worker, respondent Redmond asked the district court to preclude such discovery, asserting that the entirety of her conversations with the social worker were shielded by a psychotherapist-patient privilege. (App. 16-28.) Respondent supported her motion to quash with an affidavit from the social worker averring that all of her conversations with respondent "had pertained to my provision of counseling and counseling services." (App. 18.) The social worker's affidavit was silent as to any promise of confidentiality and did not contain any averment that disclosure of information revealed in the counseling sessions would harm respondent.[8]

On consideration of respondent Redmond's motion to quash, the district court held that the privilege issue was governed by federal, rather than state law.[9] (Pet.App. 27-29.) The district judge relied on Proposed Rule of Evidence 504,[10] and concluded that statements made to a social worker were not privileged. (Pet.App. 30.) The district court did, however, restrict to "counsel's eyes only" disclosure of information to be obtained from the social worker (Pet.App. 31) and limited disclosure to statements that respondent had made about the shooting.

In subsequent rulings,[11] the district judge stated that he

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8. Respondents' counsel subsequently asserted that "disclosure of communications between [respondent Redmond] and Ms. Beyer would be injurious in the extreme — it would totally destroy a professional, therapeutic relationship." (App. 35.) Respondents did not submit any evidentiary material to support this assertion.

9. Respondents did not challenge this ruling on appeal.

10. The proposed rule is set out in the addendum, *infra*.

11. These rulings came in response to petitioner's motions to compel (App. 31-32, 62-63, 70-72) and for sanctions (App. 64-65, 75-76).

was only authorizing inquiry into discussions with the social worker that were "fact-oriented — that is, having to do with [the] description of the episode, recollections of the episode." (Pet.App. 36.) The trial judge permitted a "narrow inquiry," (Pet.App. 47), under which petitioner could inquire about disclosures made "of the incidents of the day" of the shooting. (Pet.App. 48.) The court expressly prohibited inquiry about whether respondent had spoken about her dreams (Pet.App. 49) or about her weight loss. (*Id.*) To ensure compliance with his rulings, the district judge required that the portion of the deposition of respondent Redmond concerning conversations with the social worker be supervised by a magistrate judge. (Pet.App. 38-39.)

B. The Sanction Rulings

When her deposition was resumed, respondent Redmond asserted that she could not recall the contents of her conversations with the social worker: Redmond stated that she was unable to remember whether she told Beyer that she had shot someone to death, whether she told Beyer that she had drawn her gun, whether she had discussed with Beyer her belief that she was justified in shooting Ricky Allen, or whether she had told Beyer why she had shot Ricky Allen.[12] (App. 64.)

On consideration of petitioner's motion for sanctions (App. 64-65), the district judge set the matter for an evidentiary hearing. (Order, December 4, 1992.) After hearing from respondent Redmond, the district court refused to credit Redmond's claimed inability to recall what she had told the social worker about the facts of the shooting:

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12. At trial, respondent Redmond claimed an inability to recall eleven specific areas that were relevant to her use of deadly force. (App. 102-07.)

> * * * I do not find that what has been said by Ms. Redmond today is entirely believable. I really do not find it believable that she would have such a nearly total absence of recollection about discussions about an enormously important event in her life, unless the mindset that she was approaching the questions with, was one that adopted an extraordinarily blinded approach. (Pet.App. 52)

In response to respondent Redmond's claimed inability to recall, the district judge ordered that petitioner's attorneys would be permitted to review the notes made by the social worker "which relate to the subject matter" of conversations (Pet.App. 58) and could depose the social worker about conversations that were directly relevant to the lawsuit. (Pet.App. 57.) The district judge stated that he was not permitting "open season" (Pet.App. 57) and admonished counsel to refrain from questioning the social worker about conversations not directly related to the lawsuit. (Pet.App. 57-58.)

After the social worker had been redeposed about the subject matters of conversations and had produced three pages of heavily redacted notes, petitioner returned to the district court, seeking permission to conduct a broader inquiry. (App. 70-72.) Petitioner argued that more detailed questioning was required because of contradictions between respondent Redmond and the social worker.[13] The district

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13. Respondent Redmond had testified at her deposition that she had not met any members of petitioner's family before the incident and that she did not recognize Ricky Allen. (App. 70.) Respondent Redmond had also testified that at the time of the shooting, she was not suffering any stress in personal relationships. The social worker stated that respondent Redmond had told her that she had met Ricky Allen before killing him and that she had been having "a relationship problem" at the time of the shooting. (App. 70-71.)

court granted this motion and ordered the social worker to produce her unredacted notes "for counsel's eyes only." (App. 73.)

The social worker refused to produce her records without respondent Redmond's authorization. (App. 75.) When respondent refused to provide this authorization (*id.*), the district court held an evidentiary hearing on petitioner's motion for sanctions.[14] (App. 75-76.)

After an evidentiary hearing, the district court found:

> [T]hat there has been and continues to be a willful flouting of the Court's orders and authority, both by defendant MaryLu Redmond and by Karen Beyer, who is the employee and agent of the other defendant, the Village of Hoffman Estates. And I regret to say that has continued despite the fact that I have been more than patient, I believe, in giving each of them the opportunity for compliance. (Pet.App. 61)

As a sanction, the district judge stated that he would preclude Redmond from testifying at trial "as to her version of the event in which she shot Ricky Allen." (Pet.App. 62.)

On the eve of trial, respondents asked the district court to reconsider its order barring Redmond's testimony. (App. 77-82.) The district court granted this motion, permitting Redmond to testify, but holding that the jury would be instructed about an adverse inference from non-production of the counseling records. (App. 83-90.) The district judge stated that the instruction about the adverse inference did not

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14. Respondents did not seek to submit the records for *in camera* inspection.

rest on his rejection of the claimed privilege (App. 89), but was the "least severe sanction" (App. 88) for respondents' "open defiance" of court orders. (*Id.*) The district judge reiterated this view in an *in limine* ruling, stating that respondent Redmond's decision to withhold evidence had prevented him from making "the kind of calculated and careful judgment" that required "all of the facts." (App. 94.)

C. References at Trial to Conversations with the Social Worker

At trial, petitioner impeached respondent Redmond with her inability to recall the content of her conversations about the shooting with Beyer. (App. 102-07.) Respondent Redmond testified on cross-examination that her recollection about how she had been holding the gun when she shot Ricky Allen was better at the time of trial than it had been a few hours after the incident. (App. 141.) Petitioner elicited testimony from Beyer that at one point in counseling, respondent could not recall pulling the trigger (App. 113), but that she was able to remember details of the incident and "even later recalled pulling the trigger" after 50 sessions. (*Id.*)

In final arguments, petitioner contended that respondent was trying to hide the truth by claiming an inability to recall her conversations with Beyer. (App. 168-169.) Petitioner pointed out the conflict between respondent and Beyer about the personal problems that respondent was having on the day of the shooting. (App. 168.) Petitioner also argued that respondent Redmond had "made up the story to help her live with this horrible thing that she did back in 1991." (App. 173)

The district court instructed the jury that it was entitled to draw a negative inference from respondents' refusal to produce Beyer's notes. (Pet.App. 67.)

D. Ruling on Appeal

On respondents' appeal, the Seventh Circuit held that the district court had erred in requiring disclosure of any of the conversations between respondent and the social worker. The court of appeals recognized the conflict between the circuits on the existence of a psychotherapist privilege (Pet.App. 16-17) and held that a broad psychotherapist privilege would "encourage troubled individuals . . . to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors." (Pet.App. 18.) The Seventh Circuit concluded that the privilege should extend beyond psychiatrists and psychologists and apply to all "mental health care providers as well, including licensed clinical social workers." (Pet.App. 22 n.19.)

In the view of the Court of Appeals, the inquiry permitted by the district court into the subject matter of conversations with the social worker resulted in cumulative evidence (Pet.App. 23) and involved "confidential communications" that were protected from disclosure. (*Id.*) The Seventh Circuit characterized respondent Redmond's inability to recall conversations with the social worker as "noncompliance with the district court's order" which was "justified" because truthful answers would have resulted in "irreparable injury." (Pet.App. 8 n.8.) Without reaching petitioner's argument that the district court's instruction on failure to produce evidence was a permissible sanction for Redmond's failure to abide by discovery orders, the Seventh Circuit reversed the jury verdict and remanded for a new trial. (Pet.App. 24.)

SUMMARY OF ARGUMENT

Federal courts have the authority under Rule 501 of the Federal Rules of Evidence to establish new evidentiary privileges "in the light of reason and experience." This Court

has been cautious in creating exceptions to the principle that the public has a right to every person's evidence, and has carefully weighed the costs and benefits of each new claimed privilege.

There are substantial costs to the broad psychotherapist-client privilege sought by respondents. Therapists are not officers of the court, have no interest in the search for truth, and through psychotherapy, may create both correct and incorrect recollections of an incident.

This civil rights case turned on respondent Redmond's ability to recount believably the events surrounding her use of deadly force to kill petitioner's decedent Ricky Allen. Respondent Redmond testified that she had shot Allen because he was armed with a knife and about to strike another; petitioner presented evidence from Allen's siblings that Allen was unarmed and not threatening anyone when he was shot and killed.

Respondent Redmond's recollections of the incident had been sharpened before trial by more than fifty sessions with a social worker employed by respondent Village of Hoffman Estates. Redmond testified that her recollection of the shooting was better at the time of trial than it had been shortly after the shooting. The social worker confirmed that Redmond's ability to recall increased during counseling.

The broad psychotherapist privilege urged by respondents would withhold from the jury evidence that respondent Redmond's recollections had been enhanced by counseling. The privilege would also withhold from the jury contradictions between Redmond's trial testimony and her pre-trial statements to the social worker.

The benefits of the broad psychotherapist privilege advocated by respondents are highly speculative. The scientific evidence to support respondents' demand for absolute confidentiality is inconclusive. Moreover, while all health

care professions include some rule of confidentiality within their ethical standards, there is general acceptance that an expectation of absolute confidentiality in psychotherapy is unrealistic: without exception, therapists recognize a duty to reveal confidential information when the welfare of others is significantly threatened.

State therapist privilege statutes do not support the broad privilege urged by respondents in this case. Many states afford a lesser privilege to social workers than to psychiatrists and licensed clinical psychologists. The myriad of exceptions in the state statutes reflect decisions that the need to enforce civil and criminal law outweighs the benefits of a privilege. The same balancing supports denying a federal privilege to those who violate federal civil rights statutes.

The privacy interests involved in confidential communications with a psychotherapist can be fully protected by the federal courts without the creation of a new privilege. As with the protection of editorial processes in *Herbert v. Lando*, 441 U.S. 153 (1979), Rule 26 of the Federal Rules of Civil Procedure provides an adequate tool to regulate unwarranted invasions of privacy in civil cases. The record in this case shows how a district judge may carefully balance privacy interests with a litigant's right to prosecute a federal civil rights case. The Court should reject the privilege fashioned by the Court of Appeals and reinstate the judgment of the district court.

ARGUMENT

A. RULE 501

Rule 501 of the Federal Rules of Evidence is the starting point for considering the correctness of the psychotherapist privilege fashioned by the Court of Appeals. The Rule provides in pertinent part that privileges are "governed by the

principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."

The Court has refused to use the authority of Rule 501 "expansively." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). Both before and after adoption of Rule 501, the Court has declined to create any privilege not recognized at common law: the Court has recognized a common law privilege for trade secrets, *E.I. DuPont De Nemours Powders Co. v. Masland*, 244 U.S. 100, 103 (1917), and a common law privilege for military secrets, *United States v. Reynolds*, 345 U.S. 1 (1953), but the Court has turned down requests for a newsgatherer's privilege, *Branzburg v. Hayes*, 408 U.S. 665 (1972), an accountant's privilege, *Couch v. United States*, 409 U.S. 322 (1973), an editorialist's privilege, *Herbert v. Lando*, 441 U.S. 153 (1979), a state legislator's privilege, *United States v. Gillock*, 445 U.S. 360, 367 (1980), an accountant's work product privilege, *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984), and an academic peer-review privilege. *University of Pennsylvania v. EEOC, supra.*

The Court's purposeful unwillingness to create evidentiary privileges is consistent with the history of Rule 501 and with the policies of the Federal Rules of Evidence.

1. *The History of Rule 501 Supports the Court's Narrow Construction of the Rule*

Rule 501 is derived from former Rule 26 of the Federal Rules of Criminal Procedure,[15] and was substituted by Congress for the privilege provisions which had been proposed by the Advisory Committee of the Judicial Conference of the United States.

Under the rules proposed by the Advisory Committee, "federal courts would have been permitted to apply only nine specifically enumerated privileges, except as otherwise required by the Constitution or provided by Acts of Congress." *United States v. Gillock*, 445 U.S. 360, 367 (1980). The privileges proposed by the Advisory Committee omitted a physician-patient privilege and included a psychotherapist privilege limited to communications with psychiatrists and licensed clinical psychologists.[16]

At hearings in the House, the privilege provisions of the Proposed Rules of Evidence were among the most debated — as Representative Hungate explained to the Senate Judiciary Committee, "50 percent of the complaints in our committee related to the section on privileges." Proposed Rules of Evidence: Hearings on H.R. 5643 Before the Senate Comm. on the Judiciary, 93d Cong. 2d Sess. 6 (1974).

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15. Former Criminal Rule 26 provided as follows:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

16. Proposed Rule 504 is set out in the addendum, *infra*.

The Advisory Committee's proposals were criticized for failing to provide a privilege, *inter alia*, for physicians,[17] social workers[18] and accountants.[19] Rather than create new privileges, the House abandoned the specific privileges enumerated by the Advisory Committee and left the law of privileges "where we found it." Proposed Rules of Evidence: Hearings on H.R. 5643 Before the Senate Comm. on the Judiciary, 93d Cong. 2d Sess. 6 (1974) (remarks of Rep. Hungate). The Senate accepted this approach.[20]

As enacted by Congress, Rule 501 adopts the standard of *Wolfle v. United States*, 291 U.S. 7 (1934), that "the rules governing the competence of witnesses in criminal trials in the federal courts . . . are governed by common-law principles as interpreted and applied by the federal courts in the light of reason and experience."[21] *Id.* at 12, citing *Funk v.*

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17. Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong. 1st Sess. 153, 193, 342, 448, 563 (1973).

18. Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong. 1st Sess. 458 (1973).

19. Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong. 1st Sess. 583 (1973).

20. The Senate also proposed a change in the language of Rule 501 to make plain that state privilege rules applied in diversity cases. *See* Sen. Rep. 93-1277, 93rd Cong. 2d Sess. 1974, 1974 U.S.C.C.A.N. 7051. The legislative history is thoroughly canvassed by Professor Imwinkelried in *An Hegelian Approach to Privileges under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 Neb. L. Rev. 511, 517-523 (1994).

21. Before adoption of Rule 501, privileges in federal civil cases were governed by Rule 43(a) of the Federal Rules of Civil

United States, 290 U.S. 371 (1933).

2. The Federal Rules of Evidence Favor the Admissibility of Relevant Evidence

The overall theme of the Federal Rules of Evidence favors the admissibility of evidence so that cases are decided on the merits. In adopting a "broad approach to admissibility [of official records] under Rule 803(8)(C)" in *Beech Aircraft Corp v. Rainey,* 488 U.S. 153 (1988), the Court described the Federal Rules of Evidence as having a "liberal thrust" for the admissibility of evidence. *Id.* at 169. The Court reaffirmed this view in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 113 S.Ct. 2786 (1993), stating that the "basic standard of relevance [of the Federal Rules of Evidence] . . . is a liberal one," *id.* at 2793, and describing the Rules of Evidence as having a "permissive backdrop." *Id.* at 2794.

The same "broad approach to admissibility" appears in Articles IV, VI, VII, VIII, and IX of the Federal Rules of Evidence. As Professor Imwinkelried has pointed out,[22] Rule 401 incorporates "an exceptionally broad definition of 'relevant' evidence."[23] Rule 402 "impliedly abolish[es]

Procedure. Under that rule, the court would evaluate claims of privilege by first consulting federal statutes, then considering the rules of evidence previously used by federal courts in suits in equity, and, finally, relying on the rules of evidence applied in the courts of the state in which the federal court is sitting.

22. Imwinkelried, *supra note 20,* at 537-41.

23. Under Rule 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This is a lesser requirement than other evidence statutes, such as California Evidence Code Section 210, which requires that to be relevant, an item of evidence must pertain to a "disputed" issue in the case. Imwinkelried, *supra note 20* at 537 & n.278.

uncodified exclusionary rules of evidence."[24] Rule 403 permits the trial judge to exclude relevant evidence only when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . " *See United States v. Huddleston,* 485 U.S. 681, 688 (1988). Similarly, Rule 404 was amended by Congress to place "greater emphasis on admissibility than did the final Court version." *United States v. Huddleston, supra.*

Rule 601 "eliminated all grounds of incompetency not specifically recognized" in the Federal Rules.[25] Rule 608 broadened the admissibility of impeachment evidence by permitting the admission of opinion as well as reputation evidence. Rule 613 relaxed the standards for the introduction of evidence of a witness' prior inconsistent statements. *See* Imwinkelried, *supra note 20* at 538.

Rule 701 "permits even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact." *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 169

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24. Imwinkelried, *supra note 20* at 538 & n.280. Rule 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

25. Advisory Committee Note to Rule 601. Professor Imwinkelried describes this as a "revolutionary" change. Imwinkelried, *supra note 20* at 538.

(1988). Rules 703 and 704 allow experts to rely on hearsay reports and offer opinions on the ultimate issue.

Article VIII codifies several hearsay exceptions which were minority doctrines at common law.[26] Article IX overturned common law rules on authentication and Article X "loosened several of the strictures of the common-law best evidence rule." Imwinkelried, *supra note 20* at 540.

The "permissive backdrop" of the Federal Rules of Evidence, *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra,* 113 S.Ct. at 2794, is flatly at odds with respondents' request that the Court create a new rule to exclude relevant evidence.

3. *The Narrow Construction of Rule 501 Is Consistent with the Court's Long Standing Reluctance to Create Rules to Exclude Relevant Evidence*

This Court has long been cautious in exercising its power "in the light of reason and experience" to change the rules of evidence.[27] "[J]udicial innovations explicitly expanding or contracting admissibility of evidence are rare." *Upshaw v. United States,* 335 U.S. 410, 415 (1948) (Reed, J., dissenting). As a general rule, the Court has been content both before and after the adoption of Rule 501 to recognize only privileges that existed at common law, which did not

26. These include the present sense impression exception under Rule 803(1), the use of scientific treatises under Rule 803(18), the official record exception, under Rule 803(8), and the state of mind and dying declaration exceptions of Rule 803. See Imwinkelried, *supra note 20* at 539 & nn.297, 298.

27. *See Michelson v. United States,* 335 U.S. 469, 485-86 (1948) ("the task of modernizing the longstanding rules . . . is one of magnitude and difficulty which even those dedicated to law reform do not lightly undertake.")

recognize a counseling privilege.[28]

The Court has been especially reluctant to adopt new rules to exclude relevant evidence and has adhered to the principle that "the public . . . has a right to every man's evidence." *United States v. Bryan,* 339 U.S. 323, 331 (1950). As the Court stated in *United States v. Nixon,* 418 U.S. 683 (1974), "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* at 709.

In *Branzburg v. Hayes,* 408 U.S. 665 (1972), the Court was asked to recognize a newsgatherer's privilege. The Court acknowledged the First Amendment interests involved in the claimed privilege, but refused to create a new privilege, relying on the trial court's power to ensure that grand juries "operate within the limits of the First Amendment as well as the Fifth." *Id.* at 708. The Court followed this approach in *Herbert v. Lando,* 441 U.S. 153 (1979), where the Court was asked to recognize a privilege that would have foreclosed inquiry into the "thoughts, opinions, and conclusions with respect to material gathered by [a journalist] and about his conversations with his editorial colleagues." *Id.* at 158. The Court recognized that editorial discussions have "constitutional protection from casual inquiry," 441 U.S. at 174, but

28. For this reason, the lower federal courts have in general refused to recognize a counseling privilege. *See, e.g., Slakan v. Porter,* 737 F.2d 368 (4th Cir. 1989); *United States v. Moore,* 970 F.2d 48 (5th Cir. 1992); *In re Grand Jury Proceedings,* 867 F.2d 562 (9th Cir. 1989); *United States v. Burtrum,* 17 F.3d 1299 (10th Cir. 1994); *Hancock v. Hobbs,* 967 F.2d 462 (11th Cir. 1992). The Second and Sixth Circuits have each recognized a limited psychiatrist-patient privilege. *In re Zuniga,* 714 F.2d 632, 637 (6th Cir. 1983); *In re Doe,* 964 F.2d 1325 (2d Cir. 1992).

declined to recognize a privilege, holding that the district court's power to regulate discovery provided ample protection for the privacy interests. *Id.* at 177.

The Court concluded in *Trammel v. United States*, 445 U.S. 40 (1980), that "reason and experience" warranted narrowing the witness-spouse privilege. *Id.* at 53. In making this decision, the Court evaluated how the privilege had fared in the states, *id.* at 48-50, and followed the "utilitarian approach" of 8 J. Wigmore, *Evidence* §2285, at 527 (McNaughton Rev. 1961), in weighing the cost-benefit of allowing one spouse to exclude adverse testimony of his (or her) spouse. *Id.* at 50-53.

We follow this approach below and show that excluding evidence in this case because of a psychotherapist-client privilege would deprive the jury of crucial information about respondent Redmond's credibility.

B. CRUCIAL EVIDENCE WOULD BE EXCLUDED BY A PSYCHOTHERAPIST-PATIENT PRIVILEGE

The broad privilege sought by respondents would withhold from the jury crucial evidence bearing on respondent Redmond's credibility — the issue on which the case turned.

Petitioner challenged respondent Redmond's claim that her memory of the shooting was better at trial that it had been shortly after the incident (App. 141.) with Redmond's admissions that she could not recall crucial conversations with the social worker. Respondent Redmond testified that she could not recall whether she ever told Beyer that she had shot someone to death, whether she had told Beyer that she had drawn her gun, whether she ever discussed with Beyer her belief that she was justified in shooting Ricky Allen, and whether she ever told Beyer why she felt she had to shoot Ricky Allen. (App. 102-07.) These are matters that a jury would expect a person to recall; in this case, a single "I don't remember" was an admission of wrongdoing.

In his classic treatise, Wellman describes a case where three days of cross-examination had failed to pierce a witness' claim that he was ignorant and illiterate until the witness evaded a single question ("Were you not a Rabbi in the old country?") with "I don't remember." Wellman, *Art of Cross Examination*, 129 (4th ed. 1936). This is hardly a remarkable concept:

> Honest inability to remember at trial raises serious questions about clarity of memory at the time of the pretrial statements. The deceit inherent in feigned loss of memory lessens confidence in the probity of prior assertions.

California v. Green, 399 U.S. 149, 198 (1970) (Brennan, J., dissenting).

The broad privilege sought by respondents would withhold from the jury Redmond's admission to the social worker (which Redmond denied at trial) that early in counseling she had been unable to remember pulling the trigger. The broad privilege would also withhold from the jury that respondent's enhanced memory came after more than fifty meetings with a person employed by respondent Village of Hoffman Estates.

An effective tactic in cross-examination is to bring before the finder of fact the extent to which a witness has rehearsed his (or her) testimony or had his (or her) memory refreshed in pre-trial preparation.[29] Preventing the jury from learning that a witness' trial testimony had been preceded by more

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29. In a legendary example, cross examination demonstrated that "the prosecutor in that case 'phoneyed up' the evidence and turned his witnesses into 'human tape recorders' capable of parroting their narrative testimony over and over again without the slightest degree of variation." Underwood & Fortune, *Trial Ethics* §11.3, at 320 (1988).

than 50 discussions about the incident threatens the integrity of the fact finding process, especially when the witness claims that her recollection is sharper at trial than it had been hours after the incident.

The Court was confronted with a related issue when it evaluated a state rule that barred hypnotically refreshed testimony in *Rock v. Arkansas*, 483 U.S. 44 (1987). The Court noted that hypnosis appears to "increase both correct and incorrect recollections." *Id.* at 59. The same is true for psychotherapy.

A therapist is not an officer of the Court, does not owe any allegiance to the administration of justice, and unlike an attorney, *see Nix v. Whiteside*, 475 U.S. 157, 169 (1986), has no duty to prevent and disclose frauds. A therapist's obligation is to the mental health of his (or her) client. To achieve this goal, a therapist may offer suggestive cues, following an approach outlined by Freud for uncovering traumatic memories by "represent[ing] ourselves as infallible, till at last we are really told something."[30] A counselor can cause "behavioral confirmation" — forming an erroneous impression of a client and then causing the client "to behave in ways consistent with [the] erroneous impressions." Copeland & Snyder, *When Counselors Confirm: A Functional Analysis*, 21 Pers. and Social Psych. Bull. 1210 (1995). A counselor can change recollections about an incident by leading questions, suggesting details, or presenting incorrect information. Loftus & Garry, *Pseudomemories without Hypnosis*, 42 Int'l

30. Breuer & Freud, Studies in Hysteria (1893), reprinted in 2 J. Strachey (ed., transl.), *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, 279, cited in Powell & Boer, *Did Freud Mislead Patients to Confabulate Memories of Abuse?*, 74 Psych. Reports, 1283, 1297 (1994).

J. of Clinical and Exp. Hypnosis 363, 366-368 (1994). There is little question that "memory is malleable even for life's most traumatic experiences."[31]

In *Rock v. Arkansas*, *supra*, the Court observed that that cross-examination would be "an effective tool for revealing inconsistencies [in hypnotically refreshed testimony]." 483 U.S. at 60. The broad privilege advocated by respondents

31. Loftus, *The Reality of Repressed Memories*, 48 Amer. Psychologist 518, 530 (1993). As summarized by Professor Loftus (at 531):

> For example, one study examined people's recollections of how they heard the news of the 1986 explosion of the space shuttle *Challenger* (citation omitted). Subjects were questioned on the morning after the explosion and again nearly three years later. Most described their memories as vivid, but none of them were entirely correct, and more than one third were wildly inaccurate.
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> Another study (citation omitted) demonstrated the malleability of memory for a serious life-and-death situation. The subjects had attended an important high school football game at which a player on the field went into cardiac arrest. Paramedics tried to resuscitate the player and apparently failed. The audience reactions ranged from complete silence, to sobbing, to screaming. (Ultimately, fortunately, the player was revived at the hospital.) Six years later, many of these people were interviewed. Errors of recollection were common. Moreover, when exposed to misleading information about this life-and-death event, many individuals absorbed the misinformation into their recollections. For example, more than one fourth of the players were persuaded that they had seen blood on the player's jersey after receiving false suggestion to this effect.

would deprive litigants of this effective tool when, as in this case, a compelling argument was made that respondent Redmond's testimony had been synthesized by counseling into a "story to help her live with this horrible thing that she did." (App. 173.)

The Court of Appeals was in error in dismissing as "cumulative" evidence about the conversations between respondent Redmond and the social worker. (Pet.App. 23.) Redmond's claimed inability to recall the contents of conversations with Beyer is not cumulative, but is highly relevant evidence. Moreover, while there were eyewitnesses to the shooting, the credibility of these witnesses — each a sibling of petitioner's decedent — was vigorously challenged by respondents. Only respondent Redmond and the social worker could testify about the more than fifty therapy sessions that had enhanced Redmond's recollections about the shooting. The jury was entitled to hear what Redmond had done after the shooting to improve her memory.

"[W]e can all agree that it is a misfortune when a lawsuit is won by the party who would lose if all the facts were known, and we increase the risk of such a miscarriage of justice whenever we allow an important witness to keep any helpful facts away from the judge and jury."[32] Such would be the result if the Court adopted the broad privilege sought by respondents. We show below that the benefits of the requested privilege are wholly speculative and do not justify impairment of the fact finding process.

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32. Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?* 52 Yale. L.J. 607, 609 (1953).

C. THE BENEFITS OF THE REQUESTED PRIVILEGE ARE SPECULATIVE

There is no dispute that all health care professions include some rule of confidentiality within their ethical standards.[33] Nor is there a dispute that confidentiality is not absolute: While at one time therapists could unabashedly argue for an absolute privilege, "almost everyone writing in this area agrees that an expectation of absolute confidentiality in psychotherapy is unrealistic,"[34] and the American Psychiatric Association explicitly recognizes that a therapist must be able "to reveal confidential information related by patients when the welfare of others is significantly threatened."[35]

Modern limitations on absolute confidentiality undercut the "counseling folklore,"[36] accepted by the Court of Appeals

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33. *See, e.g.,* American Medical Association, *Revised Principles of Medical Ethics* (1980); American Psychiatric Association, *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (1981); American Psychological Association, *Ethical Principles of Psychologists* (1992); National Association of Social Workers, *Code of Ethics* (1979); American Personnel and Guidance Association, *Ethical Standards* (1981); American Nurses' Association, *Code of Ethics* (1976).

34. Appelbaum, Kapen, Walters, Lidz, & Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective,* 12 Bull. Am. Acad. Psychiatry & Law 109 (1984).

35. Green, *The Ethical Limits of Confidentiality in the Therapeutic Relationship,* 17 General Hospital Psychiatry 80, 82 (1995). Professor Slovenko's views on this issue have also changed. *See* Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope,* 23 Cath. U. L. Rev. 649, 656 (1974); Slovenko, *Letter,* 151 Am. J. Psychiatry 626 (1994).

36. McGuire, Graves & Glau, *Depth of Self-Disclosure as a Function of Assured Confidentiality and Videotape Recording,* 64 J. Counseling and Development 259, 262 (1985).

(Pet.App. 23), that complete secrecy is required for effective psychotherapy.[37] In the view of the Seventh Circuit, respondent's ability "to work out the pain and anguish undoubtedly caused by Allen's death *in all probability* depended to *a great deal* upon her trust and confidence in her counsel Karen Beyer." (Pet.App. 23, emphasis added.) There is, however, no evidence that respondent Redmond felt "pain and anguish." Nor is there any reason to believe that respondent was receiving psychoanalysis, rather than some other, more common form of counseling: therapists require "uncensored access to all of their patient's thoughts and feelings in relatively few cases."[38]

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37. This rationale appears in Guttmacher and Weihofen, *Psychiatry and the Law* 272 (1952), is a part of the Advisory's Committee's Note to Proposed Rule 504, reprinted in 56 F.R.D. 183, 242 (1973), and has been widely repeated. *See, e.g., Taylor v. United States,* 222 F.2d 398, 401 (D.C.Cir. 1955); Louisell, *The Psychologist in Today's Legal World: Part II,* 41 Minn.L.Rev. 731, 745 (1957); Note, *The Social Worker-Client Relationship and Privileged Communications,* 3 Wash.Univ.L.Q. 362, 380-82 (1965); Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers,* 61 Cal. L. Rev. 1050, 1053-54 (1973); Saltzburg, S.A., *Privileges and Professionals: Lawyers and Psychiatrists,* 66 Va.L.Rev. 596, 620 (1980); Comment, *Evidence: The Psychotherapist-Patient Privilege under Federal Rule of Evidence 501,* 23 Washburn L.J. 706, 709 (1984); Note, *The Psychotherapist-Patient Privilege in Federal Courts,* 59 Notre Dame L.Rev. 791, 795 (1984); Soffin, *The Case for a Federal Psychotherapist-Patient Privilege that Protects Patient Identity,* 1985 Duke L.J. 1217, 1225 (1985).

38. Shuman, Weiner & Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada,* 9 Int'l J. of Law and Psy. 393, 416 (1986).

Researchers have made several efforts to test the "counseling folklore" that confidentiality is essential to psychotherapy. The scientific evidence to support the benefits of confidentiality is, at best, inconclusive. As one commentator has observed, "the results of the studies are either used or ignored by both sides of the issue.[39]

In the conclusion of a trilogy of studies on confidentiality, the researchers studied the differences between the civil law province of Quebec, where a psychotherapist-client privilege is recognized, and the rest of Canada, where the privilege is not recognized. Shuman, Weiner & Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada,* 9 Int'l J. of Law and Psy. 393 (1986). The researchers concluded that "[p]sychotherapy occurs without regard to the existence of a privilege." *Id.* at 417. This result confirmed two earlier studies that the existence of a privilege had no effect on disclosures once therapy had begun. Shuman, D.W. & Weiner, M.F., *Privilege — A Comparative Study,* 12 J. Psych & Law 373, 381 (1984); Shuman, D.W. & Weiner, M.F., *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege,* 69 N.C. Law. Rev. 893, 924-27 (1982).

Other researchers have reached somewhat conflicting results in studies involving small samples.[40] These studies

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39. Domb, *I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege,* 5 J.L. & Health 209, 227 (1990).

40. *See, e.g.,* Nowell & Spruill, *If It's Not Absolutely Confidential, Will Information Be Disclosed,* 24 Prof. Psych: Research and Practice 367, 368 (1993) (study of 75 undergraduate students); Taube & Elwork, *Researching the Effects of Confidentiality Law on Patients' Self-Disclosures,* 21 Prof. Psych: Research and Practice 72 (1990) (42 outpatients); Appelbaum, Kapen, Walters, Lidz, & Roth, *Confidentiality: An Empirical Test of the*

are an insubstantial basis for a privilege. Moreover, there are therapeutic benefits to limiting the privilege:

> The absence of the privilege could actually *prevent* harmful behavior. Were the absolute psychotherapist-patient privilege removed from the typical therapeutic relationship, those patients who make potentially incriminating communications to their therapists (e.g., of the desire or intent to commit a crime) might be less likely to act on those urges. They might be deterred from engaging in behaviors that have foreseeable legal consequences in order to avoid disclosure of the communication in a future criminal proceeding. In short, the removal of the psychotherapist-patient privilege could be therapeutically beneficial.
> Klotz, *Limiting the Psychotherapist-Patient Privilege: The Therapeutic Potential,* 27 Crim.L.Bull 416, 417 (1991).

A second rationale for a psychotherapist privilege is that the absence of confidentiality will deter persons from obtaining psychotherapy.[41] But for the privilege sought in this case, the only persons who could possibly be affected by rejection

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Utilitarian Perspective, 12 Bulletin of the American Academy of Psychiatry and the Law, 109 (1984) (58 outpatients).

41. This is the primary argument advanced in favor of a privilege to protect the identity of a therapy client. Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 Wayne L. Rev. 175, 188-89 (1960); Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers,* 61 Cal.L.Rev. 1050, 1053 (1973).

of the privilege would be those who become litigants in federal court, a small, if not infinitesimal number of persons. Moreover, research on this claim is inconclusive: confidentiality appears low on a list of important items in choosing a therapist.[42]

A third theory that has been urged to support a psychotherapist privilege is that preserving confidentiality shows respect for the patient's autonomy, dignity, and fidelity.[43] Respect for other, equally valid values is shown when a therapist discloses information when ordered by the court. By complying with a court order, the therapist is upholding society's quest for truth and justice and respecting the client's autonomy and dignity to be held accountable for his (or her) actions.

A final argument in support of a psychotherapist privilege is that preserving confidentiality implements a right to privacy.[44] But the right to privacy is not absolute, *Whalen v. Roe,* 429 U.S. 589 (1977), and individual privacy is transcended by a variety of public interests, as as reflected in the wide variations in state privilege statutes.

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42. Braaten, Otto, Handelsman, *What Do People Want to Know About Psychotherapy?* 30 Psychotherapy 565, 568 (1993). *See also* Nowell & Spruill, *If It's Not Absolutely Confidential, Will Information Be Disclosed,* 24 Prof. Psych: Research and Practice 367 (1993), concluding that more detailed explanations of exceptions to confidentiality would not deter prospective therapy clients.

43. Appelbaum, Kapen, Walters, Lidz, & Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective,* 12 Bulletin of the American Academy of Psychiatry and the Law, 109 (1984).

44. *See, e.g., Developments in the Law-Privileged Communications,* 98 Harv. L. Rev. 1450, 1544 (1985).

D. STATE THERAPIST PRIVILEGE STATUTES CONTAIN A PANOPLY OF EXCEPTIONS

At the present time, every state and the District of Columbia appears to have adopted some protection for confidential communications with a psychiatrist or a clinical psychologist.[45] No state has adopted the broad privilege fashioned by the Court of Appeals in this case.[46] The various statutes reflect a potpourri of exceptions and conflicting views on the types of therapy relationships that are entitled to a privilege and implement each state's balancing of confidentiality and governmental interests.

1. Case by Case Balancing

In some states, the privilege is subject to a case by case balancing by the trial judge.[47] In Connecticut, communications with a social worker may be disclosed when the trial judge has determined "that it is more important to the interests of justice that the communications and records be disclosed than that the relationship . . . be protected."[48]

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45. The West Virginia statute has been narrowly interpreted as not providing a psychotherapist-patient privilege. *See* Cleckley, *A Modest Proposal: A Psychotherapist-Patient Privilege for West Virginia*, 93 W. Va. L. Rev. 1, 37 n.234 (1990).

46. Many states provide a lesser privilege for communications with social workers. See *infra* at 35-37.

47. *See, e.g.*, N.H. Rev. Stat. Ann. §330-A-19 (Supp. 1993); N.C. Gen. Stat. §8-53.3 (1992 & Supp. 1992) (psychologists); N.C. Gen. Stat. §8-53.7 (1992 & Supp. 1992) (social workers); Va. Code Ann. §8.01-400.2 (Michie 1992) (counselors, psychologists, and social workers) W. Va. Code. §27-3-1(b)(3) (1992).

48. Conn. Gen. Stat. Ann. § 52-146(q)(c)(4). Similar provisions appear in Ill. Compiled Stat. Ann. ch. 740, §110/10 (Smith-Hurd 1993), Mass. Gen. Laws, ch. 233, §20B (West 1986 & Supp. 1994), and South Carolina, S.C. Code Ann. §44-22-90.

2. Exceptions in Cases Involving Child Custody and Child Abuse

In some states, therapist communications that relate to child custody are not privileged when the mental state of one of the parents is at issue.[49] Virtually all states preclude any privilege in cases involving child abuse,[50] in proceedings to revoke a day care or foster care license,[51] or involving abuse of disabled or incapacitated adults.[52]

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49. *See, e.g., Harbin v. Harbin*, 495 So.2d 72 (Ala. 1986).

50. *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3620 (1982 and Supp. 1992); Ark. Code Ann. §12-12-511 (Supp. 1994); Del. R. of Evid. 503(d)(4); Idaho R. of Evid. 518; La. Rev. Stat. Ann. §37:2363; Mo. Ann. Stat. §337.636(3) (Vernon Supp. 1994); N.M. Stat. Ann., §61-31-24 (Michie 1990 pamphlet) (social worker only); N.Y. Civ. Prac. L & R, §4508(3) (McKinney 1992 & 1994 Supp.) (social worker only); N.C. Gen. Stat. §8-53.3 (1992 & Supp. 1992); Okla. Stat. Ann. tit. 59, §1272.1(3) (West Supp. 1993) (social worker only); Or. Rev. Stat. Ann. §40.250(4) (1988 & Supp. 1992) (social worker only); R.I. Gen. Laws §5-37.3-3 to -4 (1987 & Supp. 1993); S.D. Codified Laws Ann. §36-26-30(3) (1987 & Supp. 1993) (social worker only); Vt. R. Evid. 503(d)(4); Va. Code Ann §8.01-400.2 (Michie 1992); W. Va. Code §30-30-12(a)(2) (Michie Supp. 1992) (social worker only); Wis. Stat. Ann. §905.04(4)(e) (West Supp. 1993); Wyo. Stat. §3327-123(a)(i) (Supp. 1993).

51. *See, e.g.*, Minn. Stat. §595.02 (West 1988 & Supp. 1994).

52. *See, e.g.*, Ariz. Rev. Stat. §46-4530 (1982 & Supp. 1992); La. Rev. Stat. Ann. §37:2363; N.C. Gen. Stat. §8-53.3 (1992 & Supp. 1992); Wyo. Stat. §3327-123(a)(i) (Supp. 1993).

3. *Exceptions for Criminal Cases*

In some jurisdictions, the privilege is unavailable in serious criminal cases,[53] or when the information pertains to a criminal act.[54] In the District of Columbia, Congress has exempted from the privilege communications involving fraud in receiving Social Security benefits.[55]

Many states restrict the privilege in criminal cases when a defendant raises an insanity defense[56] or a mental disability defense,[57] or when the "services of the therapist were sought, obtained, or used to enable or aid anyone to commit or plan a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud."[58] One state precludes the privilege in any judicial proceeding involving narcotics.[59]

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53. In the District of Columbia, there is no privilege in criminal case where "the accused is charged with causing the death or, or causing injuries upon, a human being, and the disclosure is required in the interests of public justice." D.C. Code Ann. §14-307 (1989 and Supp. 1993). In Illinois, there is no privilege in investigations of and trials for homicide "when the disclosure relates directly to the fact or immediate circumstances of the homicide." Ill. Compiled Stat. Ann. ch. 740, §110/10 (Smith-Hurd 1993). Indiana and Wisconsin have similar provisions. Ind. Code Ann. §25-33-1-17 (Burns Supp. 1994); Wis. Stat. Ann. §905.04(4)(d) (West Supp. 1993).
54. *See, e.g.*, Mo. Ann. Stat. §337.636 (Vernon Supp. 1994).
55. D.C. Code Ann. §14-307(b)(4) (1989 and Supp. 1993).
56. *See, e.g., Free v. State*, 455 So.2d 137 (Ala. Crim. App. 1984).
57. *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3993 (1992 and Supp. 1993); D.C. Code Ann. §14-307 (1989 and Supp. 1993).
58. Alaska R. of Evid. 504(d)(2). A similar provision appears in La. Code Evid. Ann. Art. 510 (West 1994 special pamphlet).
59. Neb. Rev. Stat. §27-504 (1989 & Supp. 1992).

In some states, the privilege does not apply to communications made to procure narcotics unlawfully.[60]

4. *Exceptions Implementing a Duty to Warn*

In some states, all therapists have a duty to reveal information about the contemplation of a crime or a harmful act.[61]

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60. Nev. Rev. Stat. §49.254 (1986 & Supp. 1994); R.I. Gen. Laws §5-37.3-3 to -4 (1987 & Supp. 1993).
61. These provisions appear to have been adopted in response to the duty to warn recognized in *Tarasoff v. Board of Regents*, 17 Cal.3d 425, 551 P.2d 334 (1976). The statutes contain different formulations of this duty. In Alaska there is no privilege when an "immediate threat of serious physical harm to an identifiable victim is communicated to a psychologist or psychological associate by a client." Alaska Stat. §08.86.200(3) (1981 & Supp. 1992). In Illinois, the privilege yields when "disclosure is necessary to warn or protect a specific individual against whom a recipient has made a specific threat of violence." Ill. Compiled Stat. Ann. ch. 740, §110/10 (Smith Hurd 1993). In Louisiana, the privilege disappears when an "immediate threat of physical violence against a clearly identified victim or victims is disclosed to the psychologist." La. Rev. Stat. Ann. §37:2363. The South Carolina statute requires "an emergency where information about the patient is needed to prevent the patient from causing harm to himself or others." S.C. Code Ann. §22-90(A)(3) (Lawyers Co-op Supp. 1993). In Tennessee, there must be an "actual threat to physically harm an identifiable victim or victims" and the treating psychiatrist must believe that the patient is likely to carry out the threat. Tenn. Code Ann. §24-1-207 (Supp. 1993). Tennessee law does not have comparable provisions for clinical psychologists, Tenn. Code. Ann. §63-11-213 (Supp. 1993), or "certified master social workers." Tenn. Code. Ann. §63-23-107 (Supp. 1993). The Texas standard is a "probability of imminent physical injury by the patient to the patient or others." Tex. Code Ann. §611.004(a)(2). The provisions in West Virginia and Wyoming are similar. W. Va. Code §27-3-1 (Michie Supp. 1992); Wyo.

Other states have imposed the duty on social workers, but not on psychiatrists or clinical psychologists.[62] In California, there is no privilege in cases involving a dangerous patient when disclosure is necessary to prevent a threatened danger.[63] Rhode Island requires a judicial determination "that the individual's physical or mental condition is of imminent and serious danger to the physical or mental health of another person" before the therapist may warn about danger.[64] This provision, though, does not apply to social workers, for whom there is no privilege when "there is a clear and present danger to the safety of the patient or client or to other individuals."[65]

5. Reduced Confidentiality for Social Workers

Some states provide reduced confidentiality for therapy communications to social workers; nine states do not provide any protection for social workers.[66] In Kentucky, the trial

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Stat. §3327-123 (Supp. 1993).

62. *See, e.g.,* Ark. Code Ann. §17-39-107 (Supp. 1994) (social workers but not psychologists); Idaho R. of Evid.518; Ind. Code Ann. §25-23.6-1.1 (Burns Supp. 1994); Iowa Code Ann. §154C.5 (social worker); Del. Code Ann. tit. 24, §3013; N.J. Stat. Ann. §45:15BB-13 (West Supp. 1994); N.M. Stat. Ann. §61-31-24(2) (Michie 1990 pamphlet); N.Y. Civ. Prac. L & R §4508(2) (McKinney 1992 & Supp. 1994); Ohio Rev. Code §2317.02(G)(1)(a) (Anderson Supp. 1993); Or. Rev. Stat. Ann. §40.250(3) (1988 & Supp. 1992); W. Va. Code §30-30-12(a)(2) (Michie Supp. 1992) (social worker only).
63. *Menendez v. Superior Court,* 834 P.2d 786 (1992).
64. R.I. Gen. Laws §5-37-3.6(2)(D) (1987 & Supp. 1993).
65. R.I. Gen. Laws §5-38.1-4(b) (1987 & Supp. 1993).
66. There does not appear to be a specific social worker privilege in Alabama, Alaska, Arizona, North Dakota, Pennsylvania, Texas, Utah, Washington, and Wyoming.

court may compel disclosure of information on a finding that the "substance of communication is relevant to an essential issue in the case; no available alternative means to obtain the substantial equivalent of the communication, and the need for the information outweighs the interest protected by the privilege."[67] In Maine, there is no privilege for social workers "when a court in the exercise of sound discretion deems the disclosure necessary to the proper administration of justice."[68] Maryland does not recognize a privilege for social workers in juvenile proceedings, guardianship and adoption proceedings initiated by a child placement agency, in proceedings concerning disabled persons, and criminal or delinquency proceedings involving child abuse or neglect.[69] In Nevada, a social worker does not have a privilege in an "administrative or court-related investigation or proceeding involving the welfare of his client."[70]

Oklahoma does not provide any social worker privilege for a communication that "pertains to criminal acts or violations of any law."[71] In South Dakota there is no privilege for a communication to a social worker "that reveals the contemplation of a crime or a harmful act."[72] In Oregon, there is no privilege when a social worker is a public employee and the

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67. Ky. R. of Evid. 506.
68. Me. Rev. Stat. Ann. tit. 32, §7005 (West 1992).
69. Md. Code. Ann. Cts. & Jud. Proc. §9-121 (1989 & Supp. 1993).
70. Nev. Rev. Stat. §49.254 (1986 & Supp. 1994)
71. Okla. Stat. Ann. tit. 59, §1261.6 (West Supp. 1993). The identical communication to a psychiatrist or clinical psychologist would be privileged. Okla. Stat. Ann. tit. 12, §2503 (West Supp. 1993).
72. S.D. Codified Laws Ann. §36-26-30(2) (1987 & Supp. 1993).

employer determined that "examination in a civil or criminal court proceeding is necessary in the performance of the duty of the social worker as a public employee."[73]

6. Therapists Covered by Statutory Privileges

In its decision in this case, the Seventh Circuit created a privilege for all "mental health care providers" (Pet.App. 22 n.19) apparently seeking to include "any professional who provides counseling or mental health therapy, including social workers, psychiatric nurses, and counselors, as well as psychologists, and psychiatrists."[74] The states have made different choices about the class of persons covered by a therapist privilege. Some states also extend a privilege to licensed marital and family therapists,[75] "licensed professional counselor,"[76] psychiatric nurses,[77] any licensed registered nurse,[78] and certified professional art therapists.[79]

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73. Or. Rev. Stat. Ann. §40.250 (1988 & Supp. 1992).

74. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other,* 75 Ky. L. J. 473, 475 n.1 (1986).

75. Alaska R. of Evid. 504; Calif. Evid. Code §19010 (West 1966 & Supp. 1994); Col. Rev. Stat. §13-90-102 (1989 and Supp. 1993); Fla. Stat. Ann. §90.503 (West Supp. 1993); Ga. Code §24-9-21 (1982 & Supp. 1993).

76. Ala. Code §34-8A-21; Col. Rev. Stat. §13-90-102 (1989 and Supp. 1993); Del. Code Ann. tit. 24, §3013; Ga. Code §24-9-21 (1982 & Supp. 1993).

77. Calif. Evid. Code §19010 (West 1966 & Supp. 1994); Vt. R. Evid. 503; Ga. Code §24-9-21 (1982 & Supp. 1993); Ky. R. of Evid. 507.

78. Iowa Code Ann. §622-10.

79. Ky. R. of Evid. 506.

7. Legislative Value Judgments in the State Statutes

The various state statutes reflect differing choices about the relationships that are entitled to confidentiality and the circumstances in which "it is better to prosecute offenders than it is to provide them with treatment."[80] The states have concluded that some interests, e.g., prosecution in child abuse cases, are more important than confidentiality. The same balancing would justify rejection of a counseling privilege in federal civil rights cases.

E. ENFORCEMENT OF FEDERAL CIVIL RIGHTS STATUTES OUTWEIGHS THE NEED FOR A BROAD PSYCHOTHERAPIST PRIVILEGE

The variations in the state privilege statutes reflect the different way in which each state has balanced a therapy client's interest in confidentiality with the state's interest in enforcing its civil and criminal laws. The same balancing would justify rejection of a privilege in federal civil rights cases.

Federal civil rights statutes provide a remedy for violations of "the Nation's fundamental laws," which Congress considers of "the highest importance." *City of Riverside v. Rivera,* 477 U.S. 561, 575 (1986). 42 U.S.C. §1983 provides a vehicle to enforce the provisions of the Fourteenth Amendment "against State action . . . whether that action be executive, legislative, or judicial." *Ex parte Virginia,* 100 U.S. 339, 346 (1879). The statute provides a "uniquely federal remedy against incursions under the claimed authority of state law," *Mitchum v. Foster,* 407 U.S. 225, 239 (1972), In our view, it is better to preserve this unique federal remedy

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80. Smith-Bell & Winslade, *Privacy, Confidentiality, and Privilege in Psychotherapeutic Relationships,* 64 Amer. J. Orthopsychiat. 180, 192 (1994)

than provide secret counseling for those who, under color of state law, have violated the Constitution.

F. PROPOSED RULE OF EVIDENCE 504 PROVIDES THE APPROPRIATE LIMITS FOR ANY FEDERAL PSYCHOTHERAPIST PRIVILEGE

If the Court chooses to create a federal psychotherapist privilege, it should adopt the limits of Proposed Rule of Evidence 504, which would have established a privilege applicable only psychiatrists and licensed clinical psychologists.

In *Allred v. State*, 554 P.2d 411 (Alaska 1976), one of two state appellate decisions that recognized a common law therapist privilege,[81] the Alaska Supreme Court refused to extend the privilege beyond psychiatrists and psychologists to social workers, relying on the difference between therapy and counseling. *Id.* at 418-22. A lesser privilege for social workers is consistent with this distinction.

Congressional hostility toward a privilege for social workers was evident in the legislative hearings.[82] As in *United States v. Gillock*, 445 U.S. 360 (1980), "[n]either the

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81. *State v. Evans*, 104 Ariz. 434, 454 P.2d 976 (1969), the Court essentially afforded retroactive application to a privilege statute that had been enacted after trial. This is consistent with the general rule that privileges have been adopted by state legislatures, rather than through case law.

82. Representative Hungate explained the change to the privilege rules in somewhat hyperbolic language, stating that "when you open this up, the social workers and the piano tuners want a privilege. It is a very difficult matter, so we left that where it is for now." Proposed Rules of Evidence: Hearings on H.R. 5643 Before the Senate Comm. on the Judiciary, 93d Cong. 2d Sess., 6 (1974).

Advisory Committee, the Judicial Conference, nor this Court saw fit, however, to provide the privilege sought by [respondents]." *Id.* at 367. We suggest that the Court decline to fashion a new federal privilege, and instead leave the job of balancing the competing interests for determination by district judges on a case by case basis.

G. RELYING ON THE TRIAL COURT'S DISCRETION IS SUPERIOR TO CREATING A NEW PRIVILEGE

The Court has repeatedly declined to create strict rules limiting the admissibility of evidence and has instead relied on "discretionary controls in the hands of a wise and strong trial court." *Michelson v. United States*, 335 U.S. 469, 486 (1948). The Court should continue this approach and reject respondents' request to fashion a new evidentiary privilege.

The Court's reliance on the discretion of the trial court is illustrated in *United States v. Reynolds*, 345 U.S. 1 (1953). There, the government invoked the common law privilege against revealing military secrets to resist production of a report concerning a plane crash. The Court noted that the case arose in "a time of vigorous preparation for national defense," 345 U.S. at 10, and noted that *in camera* inspection of the report, "even by the judge alone, in chambers," could jeopardize national security. *Id.* Nonetheless, the Court held that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," 345 U.S. at 9-10, and held that the trial judge was required to balance the need for the document against the degree to which military secrets would be compromised by disclosure of the evidence. *Id.*

The Court has also deferred to the discretion of district judges in situations far less extreme than those involving military secrets. In *Roviaro v. United States*, 353 U.S. 53 (1957), in considering a challenge to assertion of the common law informer's privilege, the Court concluded that "no fixed rule is justifiable," and that the district court's task was to balance

"public interest in protecting the flow of information against the individual's right to prepare his defense." *Id.* at 62. Similarly, in *United States v. Zolin*, 491 U.S. 554 (1989), the Court rejected an independent-evidence requirement for a litigant urging a crime-fraud exception to the attorney client privilege and held that the district court in its "sound discretion" could review *in camera* the assertedly privileged documents. *Id.* at 573.

The Court has repeatedly relied on the sound discretion of district judges in rejecting requests for new evidentiary privileges. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court rejected a request to create a newsgatherer's privilege, 408 U.S. at 689, relying instead on the power of district courts to control grand juries. *Id.* at 708. As Justice Powell explained in his concurring opinion:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional ways of adjudicating such questions.

408 U.S. at 710 (concurring opinion)

Following *Branzburg*, the Court refused to create an editorialist's privilege in *Herbert v. Lando*, 441 U.S. 153, 177 (1979). Again, the Court relied on the sound discretion of district courts "to exercise appropriate control over the discovery process." *Id.* at 177. More recently, the Court has relied on a district court's discretion in balancing a state's interest in maintaining the confidentiality of juvenile court records with a litigant's need for relevant evidence. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

District courts are familiar with case by case balancing.[83] Moreover, this is the approach taken by the Second Circuit in *In re Doe*, 964 F.2d 1325, 1329 (2d Cir. 1992), and is precisely what is currently advocated by Professor Slovenko, an early advocate of an absolute psychotherapist privilege.[84] After considering the matter for more than thirty years, Professor Slovenko has concluded as follows:

> In all cases, civil or criminal, the test is relevancy. The confidentiality of a psychotherapist-patient communication is protected from disclosure only by showing that the communication is without relevance to the issues in the case or, as a general principle, when other evidence is available and is less onerous to obtain.
>
> Of course, what is relevant does not lend to an easy answer. It's a case-by-case decision to be made by the judge.

Slovenko, *Letter*, 151 Am. J. Psychiatry 626 (1994).

The Court should again refuse to create a new evidentiary privilege and continue to rely on district courts to exercise appropriate control over the discovery process to balance competing interests.

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83. *See, e.g., Lora v. Board of Ed. of New York*, 74 F.R.D. 565 (E.D.N.Y. 1977).

84. *See* Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 199 (1960)

H. THE RECORD IN THIS CASE EXEMPLIFIES THE CAREFUL EXERCISE OF DISCRETION

The district judge in this case carefully exercised his discretion in requiring respondent to answer questions about the "description of the episode, recollections of the episode" (Pet.App. 36) she had related to the social worker. To ensure that the "narrow inquiry" (Pet.App. 47) did not get out of hand, the court required that respondent Redmond's deposition be supervised by a magistrate judge. (Pet.App. 38-39.)

The district court again carefully exercised its discretion after respondent Redmond, having been ordered to testify, claimed an inability to recall what she had told the social worker about the facts of the shooting. In order to make an informed judgment, the district judge set the matter for an evidentiary hearing so that he could make credibility determinations about respondent Redmond's inability to recall. After hearing respondent's testimony, the district judge found that she was not being truthful and authorized a limited further inquiry, in which petitioner's attorneys could review the notes made by the social worker "which relate to the subject matter" of conversations (Pet.App. 58) and could depose the social worker about the content of conversations that were directly relevant to the lawsuit. (Pet.App. 57.)

The district court was again asked to exercise its discretion after the resumed deposition of the social worker produced evidence that respondent Redmond had not been truthful at her deposition. (App. 70-72.) The trial judge then ordered the social worker to produce her unredacted notes for inspection "for counsel's eyes only." (App. 73.)

The final exercise of the district court's discretion came when the social worker refused to produce her records without respondent Redmond's authorization, which respondent refused to provide. (App. 75.) After an evidentiary hearing, and without any request from

respondents to submit the records for *in camera* inspection, the district court found "that there has been and continues to be a willful flouting of the Court's orders and authority, both by defendant MaryLu Redmond and by Karen Beyer, who is the employee and agent of the other defendant, the Village of Hoffman Estates." (Pet.App. 61) The district judge was initially inclined to preclude Redmond from testifying at trial. (Pet.App. 62.) Although the trial judge later modified this sanction to permit Redmond to testify, he instructed the jury about an adverse inference flowing from the non-production of the counseling records. (App. 83-90.)

The district court's rulings carefully protected respondent Redmond's privacy interests. Petitioner was not permitted to inquire about respondent's dreams (Pet.App. 49); the district judge limited inquiry into conversations with the social worker about the facts of the shooting. There should be little expectation of privacy when facts that will be at issue in a lawsuit are discussed with a social worker. *Cf. Couch v. United States,* 409 U.S. 322, 335 (1973) (no expectation of privacy in information disclosed to accountant for preparation of tax returns).

The only tool that was not used by the district court was an *in camera* review of the social worker's records. This vehicle, though, was rejected by respondent Redmond (App. 93) and the district judge viewed her claims of unfairness as someone "saying that she ought to cry for mercy because having killed her parents she's an orphan." (*Id.*)

The record in this case shows that respondents intentionally flouted the district court's discovery orders. The record also shows that the careful and patient exercise of discretion by a district judge to balance respondent Redmond's privacy interests with petitioner's need for relevant evidence. Here, it is plain that the new evidentiary privilege sought by respondents is unnecessary and unwarranted and should not be adopted by the Court.

CONCLUSION

It is therefore respectfully submitted that the decision of the Court of Appeals should be reversed and the case remanded with instructions to reinstate the judgment of the district court.

November, 1995

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ADDENDUM

Proposed Rule of Evidence 504

PSYCHOTHERAPIST-PATIENT PRIVILEGE

(a) *Definitions.*

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) *General Rule of Privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority to do so is

presumed in the absence of evidence to the contrary.

(d) *Exceptions*

(1) *Proceedings for Hospitalization.* There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by order of judge.* If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) *Condition an element of claim or defense.* There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.